IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-33

ALDENS, INC.,

Petitioner,

v.

PATRICK C. RYAN, Administrator of Consumer Affairs for the State of Oklahoma,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Aldens, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals, for the Tenth Circuit entered in this case on February 27, 1978.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Tenth Circuit (A23-A27)[1] is reported at 571 F. 2d 1159; the opinion of the United States District Court for the Western District of Oklahoma (A1-A20) has not yet been officially reported.

1. References herein to "A" pages are to pages in the appendix to this petition.

JURISDICTION.

The judgment of the Court of Appeals (A28) was entered on February 27, 1978. Aldens filed a timely petition for rehearing en banc which was denied on April 4, 1978 (A29-A30).

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

Is not a state statute regulating the terms and conditions of retail sales contracts unconstitutional under the Commerce and Due Process Clauses as applied to a mail order seller which engages in no local activities and has no property in the regulating state and whose only contact with the residents of that state is by interstate mail or common carrier?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

Article I, Section 8, Clause 3 of the Constitution of the United States provides:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . ."

The Fourteenth Amendment of the Constitution of the United States provides at Section 1:

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Sections 1-201 and 1-201A of the Oklahoma Consumer Credit Code, OKLA. STAT. tit. 14A, §§ 1-201, 1-201A, provide in pertinent part:

§ 1-201. *Territorial application.*—(1) Except as otherwise provided in this section, this Act applies to sales, leases, and loans made in this State and to modifications, including refinancings, consolidations, and deferrals, made in this State, of sales, leases, and loans, wherever made. For purposes of this Act.

> (a) a sale or modification of a sale agreement is made in this State if the buyer's agreement or offer to purchase or to modify is received by the seller in this State;
>
> • • •

(2) With respect to sales made pursuant to a revolving charge account (Section 2-108), this Act applies if the buyer's communication or indication of his intention to establish the account is received by the seller in this State. If no communication or indication of intention is given by the buyer before the first sale, this Act applies if the seller's communication notifying the buyer of the privilege of using the account is mailed or personally delivered in this State.

• • •

(5) If a consumer credit sale, consumer lease, or consumer loan, or modification thereof, is made in another state to a person who is a resident of this State when the sale, lease, loan or modification is made, the following provisions apply as though the transaction occurred in this State:

> (a) a seller, lessor, lender, or assignee of his rights, may not collect charges through actions or other proceedings in excess of those permitted by the Article on Credit Sales (Article 2) or by the Article on Loans (Article 3);
>
> • • •

§ 1-201A. *Extraterritorial application.*—With respect to a consumer credit sale or consumer loan to which this Code does not otherwise apply by reason of Section 1-201, if, pursuant to a solicitation relating to a consumer credit sale or loan received in this state, a person who is a resident of this state sends a signed writing evidencing the obligation or offer of the person to a creditor in another state, and the person receives the goods or services purchased or the cash proceeds of the loan in this state:

1. The creditor may not contract for or receive charges exceeding those permitted by this Code, and such charges as do exceed those permitted are excess charges for purposes of Sections 5-202(3) and (4) and 6-113 of the Code and such sections shall apply as though the consumer credit sale or consumer loan were made in this state; and

2. The provisions on Powers and Functions of Administrator (Part 1 of Article 6 of this Code) shall apply as though the consumer credit sale or consumer loan were made in this state.

STATEMENT.

This petition pleads the cause of an interstate trader who seeks to service a national, interstate market for consumer credit purchases within the historic protections of the Commerce Clause against "a virtual welter of complicated obligations to local jurisdictions," **National Bellas Hess v. Illinois Department of Revenue,** 386 U. S. 753, 760 (1967),—"obligations" which have substantially diminished and, if not remedied by this Court, will eventually destroy an interstate market—in direct contravention of constitutional law, precedent and policy.

Petitioner, like many other mail order houses in this country, has decided to limit its business activities strictly to those of an interstate nature, foregoing the obvious economic benefits of local business activity in order to cultivate a broader national interstate market specifically aimed at a market which includes many of those federal citizens who cannot obtain credit at the rates available in their own states—a market others have elected not to serve. In return for having rendered itself less able to take economic advantage of local business and unable to participate effectively in the local political processes which would contribute to change in the state's regulatory laws, *see* **Southern Pacific Co. v. Arizona,** 325 U. S. 761, 776-78 n. 2 (1945), petitioner invokes the constitutional right of a mail order seller "who do[es] no more than communicate with customers in the State by mail or common carrier as part of a general interstate business," **National Geographic Society v. California Board of Equalization,** 430 U. S. 551, 559 (1977), to engage in that business free from such state regulation.

In invoking this right, petitioner also asserts the rights of those Oklahoma consumers—and those consumers nationwide—who cannot obtain credit to purchase consumer items under the credit terms which Oklahoma and some other states impose, to use the United States mails to release themselves from local regulation, in order to take advantage of one of those national markets which the Commerce Clause was designed to create and preserve.

This litigation arose because of the adoption of the Act of May 13, 1975 amending Section 1-201 of the **Oklahoma Consumer Credit Code,** OKLA. STAT. Tit. 14A, § 1-201, by adding a new section 1-201A. This section provides for extraterritorial application of the Code to transactions not covered under § 201:

> ". . . if, pursuant to a solicitation relating to a consumer credit sale or loan received in this state, a person who is a resident of this state sends a signed writing evidencing the obligation or offer of the person to a creditor in another state, and the person receives the goods or services purchased or the cash proceeds of the loan in this state . . . [t]he creditor may not contract for or receive charges exceeding those permitted by this Code. . . ."

Less than a month after the effective date of the amending act, Aldens filed the present complaint on June 3, 1975. The complaint sought judgment declaring § 1-201A and § 1-201(5)(a) of the original Code (prohibiting proceedings in Oklahoma to collect charges in excess of those permitted by Oklahoma on consumer credit sales made in another state to an Oklahoma resident) unconstitutional. Stipulations of fact were prepared and, on June 14, 1976, the Honorable Frederick A. Daugherty denied Aldens' request for declaratory judgment and dismissed the action. Chief Judge Daugherty's opinion is contained in the appendix at pages A1-A20, Aldens thereupon appealed to the United States Court of Appeals for the Tenth Circuit which affirmed in an opinion printed at pages A23-A27.

The essential factual information concerning the purely interstate character of Aldens' transactions with Oklahoma citizens is laid out in the opinion of the court of appeals:

> "Aldens solicits by mailing its catalogues and flyers to Oklahoma residents. Its place of business is in Illinois, and it has no agents in Oklahoma, no telephone listings there. Its advertising is done only by mail. Aldens is not required to collect and remit the Oklahoma use tax, and is not required to qualify to do business in Oklahoma. The material for credit purchases and applications for credit are also sent by mail only. The credit agreement recites that it is an Illinois contract, and all orders are accepted in Illinois. Applications for credit from Oklahoma residents for the most part are checked with national credit agencies and a few are checked directly with Oklahoma sources by Aldens." (571 F. 2d at 1161, A24)

Nevertheless, the court noted that the number and dollar volume of credit transactions between Aldens and Oklahoma residents which would fall within the amended Code were substantial. It also noted that while Aldens' finance charges comply with Illinois law and the transactions are in conformity with federal Regulation Z, "the interest rates as computed as Aldens exceed the maximum provided in the Oklahoma Code" (*id.*, A24-A25).

Without discussing the decisions of this Court relied upon by Aldens in its brief and argument, the court of appeals affirmed the order of the district court. This petition followed.

REASONS FOR GRANTING THE WRIT.

The Fundamental Purpose of the Commerce Clause, To Create and Protect National Markets for the Sale of Goods and Services, Precludes the Application of Oklahoma's Interest Ceiling to Petitioner, a Trader Which Deals With Customers in Oklahoma Only Through Interstate Commerce in Such a Market.

In the face of a constitutional argument which most forcefully implicates the "policy of free trade reflected in the Commerce Clause," **Bibb v. Navajo Freight Lines,** 359 U. S. 520, 529 (1959), a policy which has served to solidify the union since its inception, *see* **Gibbons v. Ogden,** 22 U. S. (9 Wheat.) 1 (1824), the court of appeals begins its opinion on the merits with the comfortable assertion that "an extended discussion on this opinion is not called for." 571 F. 2d at 1161 (A25). Yet the case at hand presents in its baldest form the question of the extent to which the courts will give meaning to the "Commerce Clause's overriding requirement of a national 'common market,'" **Hunt v. Washington Apple Advertising Commission,** 432 U. S. 333, 350 (1977), in defining that "area of trade free from interference by the States" which the Commerce Clause creates "by its own force" **Freeman v. Hewit,** 329 U. S. 249, 252 (1946). For what this petition seeks to have this Court make clear is that the protections embodied in the Commerce Clause are sufficiently broad to enable the residents of a state and an interstate trader to enter into commercial transactions on terms other than those prescribed by single state, a unit of government in a federal system from which the right to engage in interstate commerce does not flow. **H. P. Hood & Sons v. Du Mond,** 336 U. S. 525, 535 (1949).

While the question thus raised is of far-reaching importance, the context within which it arises is a simple one.

By offering consumer goods for sale at rates higher than those which Oklahoma would permit, petitioner is, in effect, selling credit to Oklahoma residents, (and consumers nationwide) who, in many cases, for whatever reasons, cannot purchase credit locally at lower rates. These individuals may be relatively poor payment risks because they have failed to pay previous debts or lack secure incomes, or they may merely lack an established credit rating. But, given the information supplied to borrowers by all lenders, including Aldens, under the Federal Truth in Lending Act, one must assume that many customers are ready to pay Aldens' higher rates because others in the business of selling credit in consumer transactions are not willing to offer contracts on terms better than those offered by Aldens.

In return for its ability to engage in such interstate trade unhampered by varied and conflicting state regulation, petitioner must avoid "the sort of localization or intrastate character," **Allenberg Cotton Co. v. Pittman,** 419 U. S. 20, 33 (1974) that would "render constitutional the obligations [sought to be imposed upon it]" **National Geographic Society v. California Board of Equalization,** 430 U. S. 551, 556 (1977). Petitioner has given up the benefits of local retail stores, local service and repair centers, a local telephone number, and local catalog order desks—all to the detriment of otherwise enhanced prospects for local business—in return for the right to cultivate freely the more general national market.

Not only does an interstate trader of petitioner's character lose the more immediate economic benefits of local business activities in order to operate within the protections of the Commerce Clause; but because of its lack of sufficient contacts with the state which seeks to regulate its conduct, it cannot effectively attempt to change the

state's substantive regulations through the normal channels of local political processes. This "Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." **Southern Pacific Co. v. Arizona,** 325 U. S. 761, 767-68 n. 2 (1945) (citations omitted).

Thus petitioner is willing to forego the benefits of significant local business activities outside of its home state, Illinois, in order to cultivate the interstate market in higher risk consumer transactions.

While the court of appeals recognized that Aldens operates only in a national interstate market for consumer credit transactions, it failed to recognize that, by applying its credit ceiling to petitioner "the State interfere[s] with the natural functioning of the interstate market," **Hughes v. Alexandria Scrap Corp.,** 426 U. S. 794, 806 (1976), in contravention of the protection afforded to the interstate trader by the Commerce Clause. "But ever since **Gibbons v. Ogden** . . . the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state. . . ." **Southern Pacific Co.,** *supra,* 325 U. S. at 767. In so limiting the ability of petitioner to cultivate the national market in consumer credit sales, the State of Oklahoma defies the "history of the Commerce Clause, that this Nation is a common market in which state lines cannot be made barriers to the free flow of . . . goods in response to the economic laws of supply and demand." **Hughes,** *supra,* 426 U. S. at 803.

It is not, however, merely the interstate trader who suffers when the Commerce Clause is not afforded its intended scope. Perhaps more importantly, what the operation of this state law accomplishes is to lock those residents

of Oklahoma who are not able or willing to travel outside of its territory inside the borders of the state, at least insofar as they may wish to purchase consumer goods on terms other than those which the state will permit. Although it is within the competence of the Oklahoma legislature to so limit the purchasing power of its residents when intrastate sellers are involved, it is not within the constitutional power of the state to deny its residents access to commercial transactions with an interstate trader; for "[i]n realizing the Founders' vision this Court has adhered strictly to the principle 'that the right to engage in interstate commerce is not the gift of a state, and . . . a state cannot regulate or restrain it.'" **Hughes,** *supra,* 426 U. S. at 808, quoting **H. P. Hood & Sons v. Du Mond,** 336 U. S. at 535.

Suppose, for example, that residents of Oklahoma were to venture by interstate highway into Illinois, and were to make credit purchases on the same terms offered by Aldens on purchases made through the mails. Would Oklahoma seriously argue that it has power to stamp its citizens with Oklahoma law, such that that state's credit ceiling would follow them wherever they would go, affecting all those with whom they would deal? To so argue would render meaningless the constitutional allocation of power to *Congress* to regulate commerce "among the several states." The conclusion can be no different in the case of an Oklahoma resident who utilizes the mails to reach a purely interstate trader—that is unless the difference between an envelope and an automobile is one of constitutional significance. Indeed in emphasizing that the right to engage in interstate commerce is not a state gratuity, this Court commented that

> "this principle makes suspect any attempt by a State to restrict or regulate the flow of commerce out of

> the State. The same principle, of course, makes equally suspect a State's similar effort to block or to regulate the flow of commerce into the State."

Hughes, *supra,* 426 U. S. at 808 n. 17.

Thus not only does petitioner assert its federally protected right to engage in national marketing, but of necessity advances the right of every consumer in "[o]ur system, fostered by the Commerce Clause, . . . [to] look to the free competition from every producing area in the Nation to protect him from exploitation by any." **H. P. Hood & Sons,** *supra,* 336 U. S. at 539.

This Court, no less than the founders, who provided that "in the matter of interstate commerce we are a single nation," **Pennsylvania v. West Virginia,** 262 U. S. 553, 596 (1923), has given firm constitutional protection from state regulation to those traders who would forego the benefits of local business activity in order to offer consumers an alternative to local commerce through the cultivation of a national interstate market. Thus a state is constitutionally prohibited from asserting its regulatory jurisdiction over "those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business," **National Bellas Hess v. Illinois Department of Revenue,** 386 U. S. 753, 757 n. 9 (1967), in "sharp distinction" to "mail order sellers with retail outlets, solicitors or property within a State," **National Geographic,** *supra,* 430 U. S. at 559.

Nor can the constitutional ban on state regulation of the interstate trader be vitiated by the argument that the coming to rest of products in a state may, in and of itself, support state regulation of a national market. The presence of the goods, rather than the seller, is not a basis for regulation; such a "slightest presence," **National Geographic** *supra,* 430 U. S. at 556, cannot suffice to enable a

state to regulate that which is in fact "a part of interstate commerce," **Allenberg Cotton Co. v. Pittman,** 419 U. S. 20, 33 (1974), for

> "All interstate commerce takes place within the confines of the States and necessarily involves 'incidents' occurring within each State through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result,"

Nippert v. Richmond, 327 U. S. 416, 423 (1946). So it has been recognized, since **Gibbons v. Ogden,** that "[c]ommerce among the states, cannot stop at the external boundary line of each state, but may be introduced into the interior . . . ." 22 U. S. (9 Wheat.) at 194. The interstate trader may flourish in a national market "free from interference by the States" **Freeman v. Hewit,** *supra,* 329 U. S. at 252, until and unless its actions are such as to constitute a "local business being conducted—an occupation made up of a series of local activities which the State can constitutionally reach," **Alaska v. Arctic Maid,** 366 U. S. 199, 204 (1961), an endeavor which, as the court of appeals recognizes, petitioner has not undertaken.

In the face of the strong protection afforded the interstate trader and its market by this Court on the basis of the extent to which the trader engages solely in national, interstate commerce, the court of appeals "balances" away the constitutional protection so afforded, notwithstanding this Court's efforts to recognize a class of cases in which "some [state] enactments may be found to be plainly . . . without state power." **Southern Pacific Co.,** *supra,* 325

U. S. at 768. For while the Court has applied a balancing test in cases in which it is appropriate, it has only recently reiterated that "the Court has employed various tests" and that "experience teaches that no single conceptual approach identifies all of the factors that may bear on a particular case." **Raymond Motor Transportation, Inc. v. Rice,** — U. S. —, —, 46 U. S. L. W. 4109, 4112 (February 21, 1978). The single most important factor on the facts of the instant case is, however, clear—petitioner, who "asymptotically approaches . . . the paradigm interstate trader," **Aldens, Inc. v. LaFollette,** 552 F. 2d 745, 750 (7th Cir. 1977), has been prohibited from offering alternative terms of purchase to consumers in interstate commerce in contravention of the "very purpose of the Commerce Clause . . . to insure a national economy free from . . . unjustifiable local entanglements," **National Bellas Hess,** *supra,* 386 U. S. at 760.

Aldens' argument, thus, is not that the State of Oklahoma acted unwisely when it set interest rates on retail purchases at a level which makes credit unavailable to a portion of its population. Although the regulations promulgated under the Federal Truth in Lending Act should serve to create a free competitive market in which informed consumers purchase credit at the best rates for them, given their credit-worthiness,[2] each state has a right to set maximum interest rates on various classes of credit transactions [3] in accordance with the best judgment of its legislature, provided only that the transaction is one which

2. Aldens' own rates indicate the effect of competition. Although Illinois law would permit charges of 21% on all outstanding balances, Aldens charges only 12% on balances in excess of $350.

3. When Oklahoma set its rates on precomputed consumer credit sales, it established a rate substantially higher than either its revolving credit rate or the rate charged by Aldens. *See* OKLA. STAT. Tit. 14A § 2-201.

the state may regulate. But there is a purely interstate market which operates as a counterbalance to the myriad local markets, and the states may not regulate this market, however much they may wish to do so. So long as Aldens deals with Oklahoma and its Oklahoma customers purely through interstate commerce, only Congress and the competitive market can regulate its credit charges.

Over the years, many national companies have sought the benefits of local operations and, in so doing, have made their activities subject to local regulations. But this acquiescence on the part of many companies to trade their freedom for local advantages should not be taken as an excuse to regulate those companies which have passed up the advantage of local presence to trade purely in interstate commerce. To do so would end one of the great benefits of competition as envisioned by the framers of the Constitution.

The Due Process Clause, as Well as the Commerce Clause, Prohibits Oklahoma's Regulation of Aldens' Finance Charges.

The same principles which led the framers of the Constitution to protect a national market against state interference through the adoption of the Commerce Clause were reaffirmed with the adoption of the Due Process Clause of the Fourteenth Amendment, as this Court held in **National Bellas Hess v. Illinois Department of Revenue,** 386 U. S. 753, 756-58 (1967). If a state has the power to enact a law which regulates a transaction which takes place wholly outside its borders simply because that transaction affects its citizens, that state will have exercised a power allocated solely to Congress and prohibited to the state by the Due Process Clause.

CONCLUSION.

For the reasons set forth above, we respectfully urge that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be granted.

Respectfully submitted,

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Dated: July 3, 1978.

Appendix.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-75-0458-D

ALDENS, INC.,
Plaintiff,

v.

PATRICK C. RYAN,
Administrator of Consumer Affairs
for the State of Oklahoma,
Defendant.

MEMORANDUM OPINION.

Plaintiff, Aldens, Inc. (Aldens) brings this action for a Judgment declaring two provisions of the Oklahoma Uniform Consumer Credit Code (UCCC), 14A Oklahoma Statutes, § 1-101 et seq., to be Constitutionally invalid. The two challenged provisions, 14A Oklahoma Statutes, § 1-201(5)(a) and § 1-201A deal with the extraterritorial application of the maximum interest rate permitted in consumer credit sales by the Oklahoma UCCC and the denial of an Oklahoma forum to persons charging interest rates in excess of those permitted by the Oklahoma UCCC. Plaintiff asserts these provisions to be unconstitutional as violative of the Commerce Clause, Article I, Section 8, and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.[1] This case has been

1. Plaintiff asserted other grounds for the unconstitutionality of these two sections in its Complaint; however, Plaintiff's argu-

submitted to the Court on a stipulation of fact, the Briefs of the Parties and the Amicus Curiae Brief of Irvin D. Parker, Administrator of the South Carolina Department of Consumer Affairs. A three-judge District Court need not be convened pursuant to 28 U. S. C. § 2281 as only declaratory relief is sought. *Seergy v. Kings County Republican County Committee*, 459 F. 2d 308 (Second Cir. 1972); *Communist Party v. State Bd. of Elec., State of Ill.*, 518 F. 2d 517 (Seventh Cir. 1975).

Aldens is a Chicago, Illinois "mail order" house which, by means of the mail and other instrumentalities of interstate commerce, solicits and fills retail merchandise orders from Oklahoma residents. Some of Aldens' sales to Oklahoma residents would constitute consumer credit sales within the meaning of the Oklahoma UCCC if that Code were held to be applicable to it. Patrick C. Ryan is the Administrator of Consumer Affairs for the State of Oklahoma, and is charged by Statute with the administration of the Oklahoma UCCC. Ryan has threatened to enforce the maximum interest provisions of the UCCC against Aldens by virtue of the two Code provisions to which Aldens objects herein.[2]

Ryan has counterclaimed against Aldens for damages and an injunction. Ryan seeks the recovery of damages allegedly sustained by Oklahoma residents as a result of Aldens' alleged collection of excessive finance charges, and an injunction restraining the collection by Aldens, in the future, of such allegedly excessive finance charges.

1. (Cont'd.)
ment has been directed only to the Commerce Clause and the Due Process Clause of the Fourteenth Amendment.

2. 28 U. S. C. § 2201 requires an "actual controversy" between parties before declaratory judgment will lie. This requirement is satisfied by the threatened enforcement of an unconstitutional statute. *Universal Film Exchanges, Inc. v. City of Chicago*, 288 F. Supp. 286 (N. D. Ill. 1968).

ELEVENTH AMENDMENT

Before reaching the merits of this case, the Court must consider a threshold jurisdictional matter which has not been raised by the parties. The Eleventh Amendment to the United States Constitution provides that:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by a Citizen of another State . . ."

A State's Eleventh Amendment immunity from suit in Federal Court extends to an action against a State official in which the State is the real party in interest. *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F. 2d 1135 (Eighth Cir. 1974). A State is the real party in interest in an action against one of its officials if the official, while acting in the capacity in which he is sued, is nothing more than an arm of the State performing a governmental function. *DeLong Corporation v. Oregon State Highway Com'n.*, 233 F. Supp. 7 (D. Or. 1964), Aff'd. 343 F. 2d 911. It is clear that the Defendant herein, who is sued in his official capacity, is, in his official capacity, an arm of the State of Oklahoma performing a governmental function. Therefore, this suit is against one of the United States by a citizen of another State and, as such, Oklahoma enjoys Eleventh Amendment immunity from suit in a Federal Court.

However, notwithstanding the language of the Eleventh Amendment which would appear to create a complete jurisdictional bar, a State may waive its Eleventh Amendment immunity and consent to be sued in a Federal Court. *Gallagher v. Continental Insurance Company*, 502 F. 2d 827 (Tenth Cir. 1974). In this action, Defendant has answered the Complaint without objection to jurisdiction, asserted a Counterclaim, entered into a stipulation of fact and submitted the case for decision on its stipulation.

On the basis of these facts, the Court finds and concludes that Oklahoma has waived its Eleventh Amendment immunity for purposes of this action only. Compare *Gallagher v. Continental Insurance Company, supra.*[3]

A second basis for the Court's exercise of jurisdiction herein is through the application of the doctrine of *Ex Parte Young*, 209 U. S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908). That doctrine is that a State official acting pursuant to an unconstitutional statute is stripped of his representative capacity because a State cannot authorize its officers to act in an unconstitutional manner. See also *Mobil Oil Corporation v. Kelley*, 493 F. 2d 784 (Fifth Cir. 1974). Thus, it appears that if the challenged provisions of the Oklahoma UCCC are in fact unconstitutional, Ryan would not be acting as an arm of the State in the enforcement of its UCCC against Aldens and Oklahoma's Eleventh Amendment immunity would be inapplicable in this action.

FACTS

The operative facts of this case, as derived from the parties' stipulation of fact, are as follows: Aldens is an Illinois corporation whose only physical assets are in Chicago, Illinois. Aldens sells merchandise to customers who reside in all 50 States. Approximately 1.03% of Aldens' total sales for the twelve months ending September 26, 1975 were to Oklahoma residents. These sales amounted to about $2,051,000.00. Approximately 19% of that sum was derived from cash sales, the balance having

3. This case is to be distinguished from *Richins v. Industrial Construction, Inc.*, 502 F. 2d 1051 (Tenth Cir. 1974) wherein the Court found that Utah had not waived its Eleventh Amendment immunity by a statutory waiver of immunity which provided that actions brought pursuant thereto would be maintained only in Utah courts. Jurisdiction herein is not based on a statutory waiver of immunity, rather it is based upon a general appearance and conduct inconsistent with the assertion of Eleventh Amendment immunity.

derived from credit sales. Most of Aldens' credit sales constitutes consumer credit transactions within the meaning of the Oklahoma UCCC.

Aldens mails catalogs to its regular Oklahoma customers four times a year. Supplemental "flyers" are mailed to these same persons six to eight times a year. Advertising is included in credit customers' monthly billing statements. There are 31,600 names on Aldens' Oklahoma catalog circulation list. In addition, Aldens will mail catalogs and flyers to some 220,000 Oklahoma residents in the year 1975. These additional mailings will be to names taken from rented mailing lists. There may be some duplication in names between Aldens' regular catalog list and the rented mailing lists. Aldens has no agent in Oklahoma, it has no physical presence in Oklahoma, and it maintains no telephone listing in Oklahoma. Aldens' only advertising in Oklahoma is by mail. Aldens is not required to collect and remit the Oklahoma Use Tax. Aldens is not required to qualify or register to do business in Oklahoma.

Applications for credit accounts and credit agreement forms are included with the advertisements Aldens mail to Oklahoma residents. An Oklahoma resident who wishes to make a credit purchase from Aldens completes the credit application and agreement and returns them to Aldens along with his order. Aldens' standard credit agreement provides that it is an Illinois contract to be governed by Illinois law. Aldens grants credit only in Chicago. Aldens accepts orders only in Chicago. Twenty-two percent of all credit applications received from Oklahoma residents are checked against a national credit index. Twenty-three percent of such applications are checked through a Chicago credit agency which obtains its information from Oklahoma credit bureaus. Aldens makes some direct calls to Oklahoma in checking Oklahoma credit applications.

Aldens' standard credit agreement provides for a monthly credit charge of 1.75% on balances of $350.00 or less. This amounts to a finance charge of 21% per year which exceeds the maximum finance charge permitted by the Oklahoma UCCC. On balances in excess of $350.00, Aldens' standard credit agreement provides for a monthly finance charge of 1% for that portion of the balance which is in excess of $350.00. This is less than the maximum finance charge permitted by the Oklahoma UCCC. Aldens' standard credit agreement complies with Regulation Z as promulgated by the Federal Reserve Board pursuant to the Federal Truth in Lending Act.

Merchandise sold to Oklahoma residents by Aldens is delivered through the mails or by common carrier. The means of delivery is selected by Aldens and the customer plays no part in this decision. Except for ten items which are sent free, the customer pays all shipping and handling costs. There are approximately 40,000 items in Aldens' catalog. Items are sent "F.O.B. Origin".

When an Oklahoma credit account becomes delinquent, Aldens attempts to collect by mail. Telephonic communication is used where appropriate. After an account has been delinquent for six months, Aldens turns it over to an independent collection agency. Aldens currently uses no Oklahoma credit agencies, although it has used Oklahoma credit agencies in the past. Neither Aldens nor any of its assignees has brought an action on account in Oklahoma since January, 1972.

Were Aldens to comply with the Oklahoma UCCC, it would suffer losses both from loss of finance charges and from special advertising and processing costs. These losses would amount to approximately $160,500.00 per year.

Aldens' Constitutional objections are directed to 14A Oklahoma Statutes § 1-201A which reads:

"With respect to a consumer credit sale or consumer loan to which this Code does not otherwise apply by reason of Section 1-201, if, pursuant to a solicitation relating to a consumer credit sale or loan received in this state, a person who is a resident of this state sends a signed writing evidencing the obligation or offer of the person to a creditor in another state, and the person receives the goods or services purchased or the cash proceeds of the loan in this state:

"1. The creditor may not contract for or receive charges exceeding those permitted by this Code, and such charges as do exceed those permitted are excess charges for purposes of Sections 5-202(3) and (4) and 6-113 of the Code and such sections shall apply as though the consumer credit sale or consumer loan were made in this state; and

"2. The provisions on Powers and Functions of Administrator (Part 1 of Article 6 of this Code) [1] shall apply as though the consumer credit sale or consumer loan were made in this state."

"1. Sections 6-101 to 6-116 of this title."

and 14A Oklahoma Statutes, § 1-201(5)(a) which reads:

"(5) If a consumer credit sale, consumer lease, or consumer loan, or modification thereof, is made in another state to a person who is a resident of this State when the sale, lease, loan, or modification is made, the following provisions apply as though the transaction occurred in this State:

"(a) a seller, lessor, lender, or assignee of his rights, may not collect charges through actions or other proceedings in excess of those permitted by the Article on Credit Sales

(Article 2) or by the Article on Loans (Article 3); . . ."

APPLICABILITY

Aldens' threshold contention is that 14A Oklahoma Statutes § 1-201A is not applicable to it in its credit sales to Oklahoma residents because its goods are not "received" by its Oklahoma customers in Oklahoma as is required by that section. Section 1-201A makes the Code applicable to an out-of-state seller, where (1) pursuant to solicitation relating to a consumer credit sale received in Oklahoma, (2) an Oklahoma resident sends a signed writing evidencing an obligation or offer to a creditor in another state, and (3) the Oklahoma resident receives the goods or services purchased in Oklahoma.

Aldens does not contend that elements (1) and (2) are not present herein. It does contend that because it sends its goods "F.O.B. Origin" and because risk of loss and title to such goods passes when the goods are placed into the hands of the carrier in Chicago, its goods are "received" by its Oklahoma customers when they are placed in the hands of the carrier in Chicago. Thus, it is Aldens' position that its goods are received by its Oklahoma customers in Chicago when the goods are placed in the hands of the carrier in Chicago.

While Aldens may be correct in its contention that risk of loss and title to goods ordered by Oklahoma residents passes when such goods are placed into the hands of a carrier in Chicago, this does not mean that the goods are not "received" in Oklahoma within the meaning of § 1-201A. The fundamental principle of statutory construction is to give effect to the intention or purpose of the Legislature as expressed in the statute under scrutiny. *Trask v. Johnson*, 452 P. 2d 575 (Ok. 1969). In reading

14A Oklahoma Statutes § 1-201A, it becomes immediately clear that the intention of the Oklahoma Legislature in enacting this Section was to make provisions of its UCCC applicable to "mail order" type sales wherein a solicitation is received in Oklahoma and the goods sold pursuant to such a solicitation ultimately come to rest in the hands of purchasers in Oklahoma. To hold that goods are received only at the time and place where title and risk of loss pass would be to defeat the obvious intention of the Oklahoma Legislature. Thus, 14A Oklahoma Statutes, § 1-201A is applicable to any situation wherein, if the other conditions are met, goods are delivered to an Oklahoma resident in Oklahoma. Passage of title and risk of loss are not important to the application of this Section. 14A Oklahoma Statutes, § 1-201A is therefore applicable in its terms to Aldens' transactions with its Oklahoma customers.

DUE PROCESS AND EXTRATERRITORIAL REGULATION

The first of Aldens' Constitutional contentions which should be considered is its assertion that the Due Process Clause of the Fourteenth Amendment prohibits Oklahoma's regulation of the finance charge assessed by Aldens in its consumer credit sales to Oklahoma residents. Unquestionably, the Due Process Clause of the Fourteenth Amendment limits the power of a State to extend the effects of its laws beyond its borders. *Hartford A. & I. Co. v. Delta & Pine Land Co.*, 292 U. S. 143, 78 L. Ed. 1178, 54 S. Ct. 634 (1934). However, more States than one may seize hold of local activities which are part of multi-State transactions and regulate to protect its own people. *Watson v. Employers Liability Assur. Corp.*, 348 U. S. 66, 99 L. Ed. 74, 75 S. Ct. 166 (1954). Where a contract affects the people of several States, each may have an interest which

leaves it free to enforce its own contract policies. *Watson v. Employers Liability Assur. Corp., supra; Alaska Packers Asso. v. Industrial Acci. Com.*, 294 U. S. 532, 79 L. Ed. 1044, 55 S. Ct. 518 (1935). In determining whether a State may extend the effects of its laws beyond its borders, the Supreme Court has examined the degree of contacts which the State seeking to regulate has with the person and/or transaction sought to be regulated. See *Watson v. Employers Liability Assur. Corp., supra.* and *Clay v. Sun Insurance Office*, 377 U. S. 179, 12 L. Ed. 2d 229, 84 S. Ct. 1197 (1964).

In *Watson v. Employers Liability Assur. Corp., supra,* the Court overruled a Fourteenth Amendment due process challenge to a Louisiana Statute which permitted direct actions against insurers even though the insurance policy sued on might have a no action clause. The facts of the case were that a British corporation issued a policy of liability insurance to an Illinois manufacturer. The policy, which was negotiated in Massachusetts and delivered both in Massachusetts and Illinois, contained a no action clause which was valid both in Massachusetts and Illinois. A Louisiana resident was allegedly injured through the use of the Illinois manufacturer's product and brought an action against the British insurer in a Louisiana State Court. The case was removed to a United States District Court where it was dismissed on the basis that the insurance policy sued on prohibited such direct actions, and that the Louisiana Statute permitting direct actions under which the Plaintiff proceeded controverted the Due Process Clause of the Fourteenth Amendment. The District Court was initially sustained on appeal but reversed by the Supreme Court. The Supreme Court held that Louisiana had sufficient contacts with the British insurer to allow the application of the Louisiana direct action statute in the

case. The factors that were considered by the Supreme Court in reaching its decision were that persons injured in Louisiana were likely to be Louisiana residents, injured persons were likely to be treated in Louisiana hospitals, injured persons were likely to become wards of the State if they did not achieve recovery for their injuries, and actions against the manufacturer on the basis of any such injuries were likely to be brought in Louisiana State Courts.

In this case the contacts between Aldens and Oklahoma are much more direct and substantial than were the contacts between Louisiana and the British insurer in *Watson, supra.* Aldens solicits orders from Oklahoma residents. Goods are shipped by Aldens from Chicago to its Oklahoma customers in Oklahoma, and credit payments are sent from Oklahoma to Chicago by Aldens' Oklahoma credit customers. Thus, there are direct and continuing contacts between Oklahoma and Aldens with respect to the transaction Oklahoma seeks to regulate. The collection of excessive interest rates from Oklahoma residents would have a direct effect on the State of Oklahoma. Thus, there are sufficient contacts between Oklahoma and Aldens to overcome Aldens' due process objections to the application of 14A Oklahoma Statutes, § 1-201A to it with respect to its credit sales to Oklahoma residents.

COMMERCE CLAUSE

Aldens advances a two-prong attack on 14A Oklahoma Statutes, § 1-201A under the Commerce Clause. Aldens contends (1) Oklahoma may not regulate its interest charges because its mail order sales to Oklahoma residents are transactions purely in interstate commerce, and (2) Oklahoma's regulation of its interest rates constitutes a multiple burden on interstate commerce.

The Commerce Clause, in conferring on Congress the power to regulate commerce, did not wholly withdraw from the State the power to regulate matters of local concern with respect to which Congress has not exercised its power, even though such State regulation might affect interstate commerce. *California v. Thompson*, 313 U. S. 109, 85 L. Ed. 1219, 61 S. Ct. 930 (1941). Ever since *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412 (1829) and *Cooley v. Port Wardens*, 12 How. 299, 13 L. Ed. 996 (1851), it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which, because of their local character, their number and their diversity, may never be fully dealt with by Congress. In the absence of Congressional action, the regulation of such matters has, subject to other applicable Constitutional restraints, been left to the States. *South Carolina State H. Dept. v. Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 734, 58 S. Ct. 510 (1938). However, ever since *Gibbons v. Ogden*, 9 Wheat 1, 6 L. Ed. 23 (1824), the States have not been deemed to have authority to impede the free flow of commerce from State to State, or to regulate those phases of the national commerce which, because of the need for national uniformity, demand that their regulation, if any, be prescribed by a single authority. *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 89 L. Ed. 1915, 65 S. Ct. 1515 (1945).

The test for determining the validity under the Commerce Clause of a State Statute affecting interstate commerce in an area in which Congress has not acted and which does not require a uniform national policy has been stated as follows:

> "Where the Statute regulates evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U. S. 137, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970).

Thus, there are four factors which should be considered in determining whether a State Statute which affects interstate commerce is valid under the Commerce Clause: (1) Has Congressional action pre-empted the field; (2) does the State regulation affect an area which requires a uniform national policy; (3) does the State regulation evenhandedly effectuate a legitimate local public interest; (4) is the burden imposed upon interstate commerce clearly excessive in relation to the putative local benefit. See also *Aldens, Inc. v. Packel*, 524 F. 2d 38 (Third Cir. 1975), cert. den. — U. S. —.

With regard to the first of the above stated factors, Congress has clearly not pre-empted the field of regulation of maximum interest rates allowable in consumer credit transactions. Congress has acted comprehensively in the field of consumer credit through the Federal Truth In Lending Act, 15 U. S. C. § 1601-1665, but it has not chosen to regulate interest rates to be charged in such transactions. Moreover, Congress has expressly deferred to State regulation of consumer credit interest rates. 15 U. S. C. 1610(b) reads:

> "(b) This subchapter does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit, nor does this subchapter

> extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply."

See also *Aldens, Inc. v. Packel, supra.* Thus, there is no pre-emption in this area.

With regard to the second of the above-stated criteria, whether this is an area which requires a uniform national policy, the Court need not consider whether this is a situation which requires a uniform national policy. Congress has the undoubted power to redefine the distribution of power over interstate commerce. It may either permit the States to regulate commerce in a manner which otherwise would not be permissible, or exclude State regulation of matters of local concern which nevertheless affect interstate commerce. *Southern Pacific Co. v. Arizona, supra.* Congress in enacting the Federal Truth in Lending Act, has deferred to State regulation of consumer credit rates. Thus, even if this was an area requiring a uniform national policy, Congress has redefined the power over interstate commerce in this area and allowed States to regulate consumer interest rates. The Court would not be entitled to substitute its judgment for that of Congress. See also *Aldens, Inc. v. Packel, supra.*

The third Commerce Clause criteria which must be considered is whether the challenged State Statute regulates in an evenhanded manner to effectuate a legitimate local concern. The evenhandedness of the Oklahoma UCCC is unquestionable. It imposes exactly the same burdens on in-State sellers as upon out-of-State sellers. It cannot be seriously contended that the Oklahoma UCCC discriminates against interstate commerce. That the regulation of consumer interest rates is a legitimate local concern is also undoubted. Congress, in the exercise of its paramount authority under the Commerce Clause, has left

the regulation of consumer credit rates to the State. Thus, in Congress' judgment, consumer credit rates are matters of local concern and it would be overreaching for this Court to reject that judgment.

The final Commerce Clause element which must be considered herein is whether the burden imposed on interstate commerce by compliance with the maximum interest rates provided by the Oklahoma UCCC clearly outweigh the local benefits which can be supposed to be derived therefrom. This standard is clearly the heart of the Commerce Clause and the gist of this case. It is only through the application of this standard that such diverse cases as *South Carolina State H. Dept. v. Barnwell Bros., supra,* and *Bibb v. Navajo Freight Lines,* 359 U. S. 520, 3 L. Ed. 2d 1003, 79 S. Ct. 962 (1959) can be reconciled. In *South Carolina State H. Dept. v. Barnwell Bros., supra,* the Court upheld a South Carolina Statute which restricted the size and weight of trucks which would be permitted to use South Carolina's highways. These size and weight restrictions were clearly out of step with the size and weight restrictions imposed by other states, and the enforcement of these restrictions would have the effect of impeding the free flow of interstate commerce through the State of South Carolina. However, the Supreme Court upheld the right of South Carolina to impose these regulations. In *Bibb v. Navajo Freight Lines, supra,* the Court overturned, as an impermissible burden on interstate commerce, an Illinois Statute which required a certain type of mud flap on trucks using Illinois highways. The type of mud flap required by Illinois was not the type of mud flap in general usage at that time. An Arkansas regulation required the use of a different type of mud flap. Thus, in order to travel through both Arkansas and Illinois, a truck would have to stop and change mud flaps. *Bibb* and

Barnwell can only be reconciled through an examination of the relative benefits to be derived locally through the application of the challenged regulation. In *Bibb*, the Court found that the type of mud flap required by Illinois had no direct relation to safety. However, in *Barnwell Bros.*, the Court found that the size and weight restrictions imposed by South Carolina had a definite and immediate relation to safe usage of South Carolina highways. Thus, a State regulation may burden to some extent interstate commerce if that regulation has a sufficiently great putative local benefit.

The determination of whether the putative local benefit clearly outweighs the burden on interstate commerce is clearly a balancing test. In *Bibb* the Court stated:

> "A State which insists on a design out of line with the requirements of almost all other States may sometimes place a great burden of delay and inconvenience on those interstate motor carriers entering or crossing its territory. Such a new safety device—out of line with the requirements of the other States—may be so compelling that the innovating State need not be the one to give way. But the present showing—balanced against the clear burden on interstate commerce—is far too inconclusive to make this mudguard meet that test."

In this case, the burden imposed on interstate commerce by the application of Oklahoma's UCCC to Aldens is clear. The parties have stipulated that it would cost Aldens $160,500.00 per year to comply with the Oklahoma UCCC. The putative local benefit is far less clear. For the past six years, Aldens' annual sales to Oklahoma residents have averaged $2,252,000.00. Aldens has approximately 13,800 Oklahoma credit customers. Their average credit balance is $176.00. During the last six years, Aldens

has assessed approximately $455,000.00 per year in finance charges on the accounts of its Oklahoma customers. Aldens' monthly finance charge on accounts less than $350.00 is 1.75%. Oklahoma law permits a 1.50% charge. Thus, assuming that all of Aldens' accounts were less than $350.00, and assuming further that a strict percentage reduction would accurately reflect the difference in amounts collected, if Aldens complied with the Oklahoma maximum of 1.50% on its charge accounts, Aldens' Oklahoma credit customers would save only $69,000.00 per year. Thus, the cost to Aldens would greatly outweigh the savings to Oklahoma residents.

However, notwithstanding that under the facts of this case the cost to Aldens to comply with the Oklahoma Code would far outweigh the savings resulting therefrom to its Oklahoma customers, the burden imposed on interstate commerce by Oklahoma's imposition of maximum interest rates does not so outweigh the putative local benefits as to constitute an impermissible burden on interstate commerce. Clearly the states have a great interest in preventing their residents from being victimized by what they consider to be excessive interest rates. See *Aldens, Inc. v. Packel, supra.* It is the task of the State Legislature to determine what constitutes excessive interest. The Court cannot determine on a case-by-case basis whether the application of State interest laws constitute an impermissible burden on interstate commerce. Thus, if Oklahoma cannot impose its maximum interest rates on Aldens in this situation because Aldens is charging only slightly above what it considers to be an acceptable interest rate, then Oklahoma could not impose its maximum interest rates in a situation where its resident was being charged an interest rate which was so in excess of the permitted interest rate that the cost of compliance would be far less than the savings to the Oklahoma resident. A State's interest in

protecting its citizens from what it considers to be excessive interest rates is far too great to allow such a result.

Moreover, Congressional deference to State interest regulation as expressed by 15 U. S. C. § 1610(b) must again be considered. Congress has paramount authority to regulate commerce between the States. It has deferred to State regulation of interest rates. Even though such regulations might otherwise constitute an impermissible multiple burden on interstate commerce, Congress has the power to allow such a burden. It has done so here. Thus, the burden on interstate commerce occasioned by the application of the Oklahoma UCCC to Aldens under the facts of this case does not outweigh the putative local benefits of the Oklahoma UCCC. Therefore, the Court concludes that the application of the Oklahoma UCCC in this case to Aldens does not violate the Commerce Clause.

ILLINOIS CONTRACT

Aldens' final Constitutional argument is that the Due Process Clause and Commerce Clause prohibit Oklahoma's refusal to honor and enforce in its Courts valid Illinois contracts as is attempted by 14A Oklahoma Statutes, § 1-201 (5)(a). Aldens' due process argument in this respect is not well taken and the very cases cited by Aldens tell the Court to rule against it. It is true that a State may not, on the grounds of policy, ignore a right which has lawfully vested elsewhere if the interest of the forum has but slight connection with the substantive contractual obligation. However, a State may prohibit enjoyment in its borders of rights acquired elsewhere which violate its laws or public policy and, under some circumstances may refuse to aid in the enforcement of such rights. *Hartford A. N. I. Co. v. Delta and Pine Land Co., supra; Home Ins. Co. v. Dick,* 281 U. S. 397, 74 L. Ed. 926, 50 S. Ct. 338 (1930). In this

case, Oklahoma has prohibited the enjoyment within its borders of rights technically acquired in Illinois under Illinois law. In view of the degree of Oklahoma's contacts with the subject transactions, Oklahoma may validly take this action without running afoul of the Due Process Clause of the Fourteenth Amendment.

With regard to Aldens' contention that the Commerce Clause prohibits Oklahoma's refusal to enforce its contracts with Oklahoma residents, all relevant factors have previously been considered. This is a case in which a State has a strong local interest in the amount of finance charges to be paid by its citizens in consumer credit sales. It is to be distinguished from *Allenberg Cotton Co., Inc. v. Pittman,* 419 U. S. 20, 42 L. Ed. 2d 195, 95 S. Ct. 260 (1974), which is relied on by Aldens. A State does not have a strong interest in denying a foreign corporation the use of its forum. However, Oklahoma does, as has previously been developed, have a strong interest in preventing its citizens from paying excessive interest. Local interest is strong enough to overcome Aldens' Commerce Clause objections. Therefore, 14A Oklahoma Statutes, § 1-201(5)(a) does not run afoul of the Commerce Clause or the Due Process Clause of the Fourteenth Amendment.

DE MINIMUS

Aldens' final contention is that Ryan is not entitled to recover on his Counterclaim (1) because the amount involved is de minimus, and (2) because the UCCC discriminates against interstate commerce in that it does not allow sufficient time for compliance. The doctrine of *de minimus non curat lex* is inapplicable herein because by Aldens' own admission the Counterclaims involve amounts in excess of $8,000.00. The fact that the cost to Aldens to compute and return these sums would exceed the amount

of the individual refunds does not render the amounts involved de minimus. With regard to the second contention, it has already been determined that § 1-201A does not discriminate against interstate commerce.

Accordingly, Judgment should be entered denying Plaintiff's request for declaratory judgment and dismissing Plaintiff's action. Judgment should be entered on Defendant's Counterclaim for damages and injunctive relief. If a hearing or other action is necessary before the amount of damages can be ascertained Defendant will initiate appropriate action without delay. Judgment will be withheld as to Plaintiff's action until Judgment is ready for entry on Defendant's Counterclaim.

Dated this 14th day of June, 1976.

FRED DAUGHERTY
Fred Daugherty
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-75-0458-D

ALDENS, INC.,
Plaintiff,

v.

PATRICK C. RYAN,
Administrator of Consumer Affairs
for the State of Oklahoma,
Defendant.

JUDGMENT.

Pursuant to the Memorandum Opinion issued herein on the *14th* day of June, 1976, it is the Judgment of this Court that Plaintiff's request for declaratory judgment be denied and Plaintiff's action be and is hereby dismissed.

With respect to Defendant's Counterclaim, pursuant to the Memorandum Opinion issued herein and the Stipulation of the parties filed herein on this 8th day of July, 1976, it is hereby ordered, adjudged and decreed that:

Within 60 days from the entry of this Judgment, Plaintiff shall refund or credit to its Oklahoma consumer credit sale customers amounts equaling the difference between the amount of finance charges assessed or collected by Plaintiff on that portion of revolving charge account balances of such customers representing sales made during the period May 14, 1975, through December 31, 1975, and the amount of finance charges that would have been collected or assessed by Plaintiff on such portion of account balances for said period had the charges been limited to

the maximum finance charges permitted by Section 2-207 of the Oklahoma Consumer Credit Code, Title 14A, Oklahoma Statutes.

It is further Ordered that refunds or credits as determined above shall be effected by Plaintiff as follows:

1. Customers without current accounts will be issued refund drafts automatically.

2. Customers with delinquent accounts will automatically have credited to their accounts the amount of any refunds; and

3. Customers with current accounts will, at the option of Plaintiff, either be issued refund drafts or have credited to their accounts the amount of any refunds.

4. Plaintiff's communications with customers shall be made by mail to the last known addresses of such customers.

Dated this 8 day of July, 1976.

FRED DAUGHERTY
Fred Daugherty
United States District Judge

ENTERED IN JUDGMENT DOCKET ON JULY 8, 1976

The foregoing proposed judgment is approved as to form.

LARRY C. BRAWNER
Larry C. Brawner
Attorney for Defendant,
Patrick C. Ryan

JAP W. BLANKENSHIP / BB
Jap W. Blankenship
Attorney for Plaintiff,
Aldens, Inc.

ALDENS, INC.,
Appellant,

v.

PATRICK C. RYAN,
Administrator of Consumer Affairs for the
State of Oklahoma,
Appellee.

No. 76-1731

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.

Argued Nov. 14, 1977.
Decided Feb. 27, 1978.

Jap W. Blankenship of Fellers, Snider, Blankenship & Bailey, Oklahoma City, Okl. (James D. Fellers, Oklahoma City, Okl., and Raymond N. Friedlander, Chicago, Ill., of counsel with him on the brief) for appellant.

Larry C. Brawner, Gen. Counsel, Oklahoma Dept. of Consumer Affairs, Oklahoma City, Okl., for appellee.

Randolph R. Mahan, Asst. Atty. Gen., and Kathleen G. Smith, Staff Atty., Columbia, S. C., on the brief for amicus curiae, Irvin D. Parker, Administrator for the S. C. Dept. of Consumer Affairs, Columbia, S. C.

Before SETH, Chief Judge, and HOLLOWAY and BARRETT, Circuit Judges.

SETH, Chief Judge.

This is a challenge to the Oklahoma Consumer Credit Code, 14A Okl. Stats. §§ 1-201(5)(a) and 1-201A, as it

applies the maximum interest rates to credit sales, and which does not permit actions in Oklahoma to collect balances where the interest rates exceed the Code maximum. It is brought by a mail-order house doing business in Illinois.

The plaintiff sought a declaratory judgment that the application of the Code provisions to its mail-order business was contrary to the Commerce Clause and Due Process Clause. The defendant Ryan as Administrator of Consumer Affairs for Oklahoma counterclaimed for damages on behalf of Oklahoma residents asserted to have been charged interest rates above the Code maximum, and also sought an injunction to prevent the collection in the future of excess charges.

The trial court found the Act to be constitutional, and entered judgment for the defendant for damages and for injunctive relief. The case was heard on stipulated facts.

The credit transactions between Aldens and Oklahoma residents are within the Oklahoma UCCC definition of consumer credit transactions. The number of such transactions and the dollar totals are substantial. Aldens solicits by mailing its catalogues and flyers to Oklahoma residents. Its place of business is in Illinois, and it has no agents in Oklahoma, no telephone listings there. Its advertising is done only by mail. Aldens is not required to collect and remit the Oklahoma use tax, and is not required to qualify to do business in Oklahoma. The material for credit purchases and applications for credit are also sent by mail only. The credit agreement recites that it is an Illinois contract, and all orders are accepted in Illinois. Applications for credit from Oklahoma residents for the most part are checked with national credit agencies and a few are checked directly with Oklahoma sources by Aldens.

The finance or credit charges made by Aldens conform with the Illinois statutes and the transactions are

also in conformance with Regulation Z. However, the interest rates as computed by Aldens exceed the maximum provided in the Oklahoma Code.

As to past due accounts Aldens attempts to make collection by mail, by phone, and ultimately turns them to a collection agency. The stipulation of facts shows that if Aldens were required to comply with the Oklahoma Code, its reduction in finance charges, and the special processing costs directed to Oklahoma separately would amount to some $160,500.00 per year. Gross sales in Oklahoma amount to some $2,250,000.00, of which eighty-one percent is on credit. There are about 13,800 credit customers in Oklahoma.

The mail-order transactions here concerned come within the provisions of the Oklahoma Code, as above mentioned. The Code is worded expressly to include mail-order solicitations, sales, and the extension of credit.

The same issues and contentions of the parties have been considered by the Third Circuit in *Aldens, Inc. v. Packel*, 524 F. 2d 38 (3d Cir.), and by the Seventh Circuit in *Aldens, Inc. v. LaFollette*, 552 F. 2d 745 (7th Cir.), and we reach the same conclusion as did those two courts.

An extended discussion in this opinion is not called for. It is sufficient to point out that the subject matter and purpose of the state regulation is the present day starting place for a consideration of the issues before us; thus the degree of interest of the state in the subject matter regulated, and how fundamental is this local interest. Against this is set the determination as to whether or not the consequential burden on commerce is clearly excessive. This is basically the teaching of *Travelers Health Ass'n v. Virginia*, 339 U. S. 643, 70 S. Ct. 927, 94 L. Ed. 1154, which, of course, concerned the regulation by a state of a mail-order insurance business. The Court there "rejected the contention" that the doctrines of place of contracting and place of perform-

ance should govern, and held that they must give way to the "degree of interest" the state had in the transaction of subject, and give way to the consequences of the contracts in the regulating states. *See also Hoopeston Canning Co. v. Cullen,* 318 U. S. 313, 63 S. Ct. 602, 87 L. Ed. 777. It is clear from times prior to *International Shoe* that the state can regulate the consequences of commercial transactions on its citizens which arise or are directed from outside its borders. The recent decisions on the point have discarded, for these purposes, the established doctrines of reliance on place of sale, place of delivery, the "presence" concept, place of contract, and place of performance which may be well recognized for other purposes.

It is apparent here, as the court said in *Aldens, Inc. v. Packel,* 524 F. 2d 38 (3d Cir.), that the state's interest in the cost of credit extended for goods sold to its residents is sufficient to overcome due process objections. The degree of interest by the State of Oklahoma in this subject is clearly sufficient to support the Oklahoma Code against the due process attack. Physical presence of Aldens in Oklahoma is not required to subject its credit rates to state regulation in transactions with Oklahoma residents.

The "per se" approach of Aldens to the Commerce Clause must be rejected for the grounds above referred to. The states can, of course, pass Acts which affect commerce unless the burden so imposed greatly exceeds the extent of the local benefits. *Complete Auto Transit, Inc. v. Brady,* 430 U. S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326; *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell,* 424 U. S. 366, 96 S. Ct. 923, 47 L. Ed. 2d 55; *Head v. New Mexico Board,* 374 U. S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983.

Thus is this burden an unreasonable one in interstate commerce? Again we refer to the Court of Appeals decisions of the Third and Seventh Circuits, and again we reach the same conclusion. There is a burden on Aldens to sort

out the Oklahoma credit transactions, and accord them somewhat different treatment. There are apparently regular mailings to some 34,000 Oklahoma residents; these are followed by additional flyers and, if required, credit applications and charge account agreements. The dollar figure of total sales in Oklahoma is in the record as is an estimated cost of special treatment for Oklahoma residents. We agree with the trial court that on balance, a conformance with the Oklahoma cost of credit rules would not constitute an undue burden on interstate commerce. In the era of computers, the record shows that a sorting of this nature, with separate Oklahoma contracts, would not be such an unreasonable burden as compared to the local interest in the subject.

AFFIRMED.

JANUARY TERM—FEBRUARY 27, 1978

Before Honorable Oliver Seth, Honorable William J. Holloway, and Honorable James E. Barrett, Circuit Judges

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No. 76-1731

(D. C. #CIV-75-0458-D)

ALDENS, INC.,
Plaintiff-Appellant,

v.

PATRICK C. RYAN, Administrator of Consumer Affairs for the State of Oklahoma,
Defendant-Appellee.

SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS,
Amicus Curiae.

JUDGMENT.

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that Court is affirmed.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips, Clerk

MARCH TERM—APRIL 4, 1978

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, and Honorable James K. Logan, Circuit Judges.

No. 76-1731

ALDENS, INC.,
Plaintiff-Appellant,

v.

PATRICK C. RYAN, Administrator of Consumer Affairs for the State of Oklahoma,
Defendant-Appellee.

SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS,
Amicus Curiae.

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc filed by appellant in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Seth, Holloway and Barrett to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of

Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-33

ALDENS, INC.,
Petitioner,

VERSUS

PATRICK C. RYAN, Administrator of Consumer Affairs for the State of Oklahoma,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

LARRY C. BRAWNER
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Department of Consumer Affairs
Attorney for Respondent

Post Office Address:
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July, 1978

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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Other Authorities Cited

In the
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-33

ALDENS, INC.,
Petitioner,

VERSUS

PATRICK C. RYAN, Administrator of Consumer Affairs for the State of Oklahoma,
Respondent.

BRIEF IN OPPOSITION

Pursuant to Rule 24 of the Rules of the Supreme Court of the United States, Respondent Patrick C. Ryan submits this brief in opposition to Aldens' Petition for a Writ of Certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (A23-A27)[1] is reported at 571 F.2d 1159; the opinion of the United States District Court for the Western District of Oklahoma (A1-20) has not yet been officially reported.

[1] References herein to "A" pages are to the Appendix found in Aldens' Petition at pages A1-A30.

QUESTIONS PRESENTED

1. Is the interest of a State in protecting its citizens from credit abuse sufficient to overcome a Due Process challenge to a statute which, pursuant to that interest, sets a maximum interest rate ceiling?

2. Does the imposition of a State's maximum interest rate ceiling on an interstate mail order seller constitute a burden on commerce which is undue and thereby violative of the Commerce Clause?

STATEMENT OF THE CASE

Nature of the Case

This is one of three identical cases brought by Aldens urging that the imposition on Petitioner of substantially similar State laws setting maximum interest rate ceilings violates the Commerce Clause of Article I, Section 8, and the Fourteenth Amendment of the United States Constitution. The Third and Seventh Circuit Courts of Appeal have, in the two previous cases, upheld the constitutionality of the usury laws of Pennsylvania and Wisconsin, respectively, as they relate to Aldens' activities in those States. This Court has twice refused to hear Petitioner's challenge of the Circuit Courts' opinions. See, *Aldens, Inc.* v. *Packel*, 524 F.2d 38 (3rd Cir. 1975), *cert. denied* 425 U.S. 943; *Aldens, Inc.* v. *LaFollette*, 552 F.2d 745 (7th Cir. 1977), *cert. denied* 434 U.S. 880.

This action was first brought in the United States District Court for the Western District of Oklahoma in June, 1975, challenging the constitutionality of Section

1-201 and 1-201A of the Oklahoma Uniform Consumer Credit Code. The relevant language from those sections is set out at pages 2, 3, and 4 of Aldens' Petition. District Judge Fred Daugherty upheld the Oklahoma law in a Memorandum Opinion (A1-A20) issued June 14, 1976. The United States Court of Appeals for the Tenth Circuit affirmed the District Court in its opinion issued February 27, 1978.

Facts of the Case

This Court may possibly misapprehend the implication of certain non-record conclusions drawn by Petitioner in its "Statement" (Aldens' Petition, pages 4-7) and in its argument (Aldens' Petition, pages 8-16) urging the granting of the Writ. Non-record statements are found at pages 5, 9, 11 and 14 wherein Petitioner implies that the rate of interest charged Aldens' Oklahoma customers is necessarily higher because these consumers are poor credit risks and, because of their poor risk status, are unable to obtain credit at the lower Oklahoma rate. There exists not one scintilla of evidence, nor even a passing inference in the record of this case which would substantiate such an unfortunate implication.

The following facts are drawn from the STIPULATION OF FACTS filed in the District Court below on November 24, 1975.

1. Aldens, Inc. ("Aldens"), is an Illinois corporation with its only physical location in Chicago, Illinois. Aldens is a general retail mail order firm, selling merchandise to residents of all fifty States.

2. For the year next preceding the filing of this litigation, Aldens' sales to Oklahoma customers totalled $2,-051,000.00, approximately 81 per cent being credit sales. The average balance of an Oklahoma customer is approximately $176.00.

3. Aldens does not have a physical location, employees or agents, and does not own any property in Oklahoma.

4. Aldens solicits its Oklahoma customers entirely by mail, with such solicitations being directed to about 220,000 Oklahomans per year.

5. In determining creditworthiness, approximately twenty-two per cent (22%) of the credit applications are checked against a national credit index located in New Jersey. Also, approximately twenty-three per cent (23%) of the applications are checked by arrangement with a Chicago, Illinois, credit reporting agency, which gets its information by telephoning any of various affiliated credit bureaus located in approximately sixty (60) cities and towns in Oklahoma. Additionally, some telephone calls are made by Aldens' personnel directly to three Oklahoma credit bureaus.

6. Aldens is not required to qualify or register to do business in Oklahoma, nor is it required to collect and remit the Oklahoma use tax.

7. Section 1-201A of the Oklahoma Credit Code (Aldens' Petition, page 4), which section allows interstate traders such as Aldens to impose an annual percentage rate of finance charge no greater than other Oklahoma creditors, became effective May 13, 1975.

8. The maximum interest rate allowed by the Oklahoma law on revolving credit accounts, such as are used by Petitioner, is eighteen per cent (18%). Prior to January 1, 1976, the rate of finance charge imposed by Aldens, at least on balances of $350.00 or less, was twenty-one per cent (21%). At that time, and pending final judgment in this action, Aldens determined to comply with the Oklahoma law in this regard.

9. Pursuant to affidavits sworn by responsible Aldens' personnel, it is stipulated that the annual cost to Aldens of complying with the Oklahoma law is approximately $160,500.00. Of this total, approximately $114,000.00 is the result of additional advertising and catalog costs and extra computer costs. The remaining $46,500.00 is the resulting loss in finance charge revenue.

THERE IS NO REASON TO GRANT THE WRIT

Although this Court has jurisdiction to grant a Writ of Certiorari to review the decision of the Tenth Circuit Court of Appeals, there is no reason to do so. This case does not meet the criteria set forth in sub. 1(b) of Rule 19, Supreme Court Rules, as considerations governing review of a Court of Appeals decision on certiorari. The decision of the court below is in accord with two other Courts of Appeal on the same matter and is fully consistent with all applicable decisions of this Court.

ARGUMENT

I.

THE COURT OF APPEALS PROPERLY HELD THAT THE DUE PROCESS CLAUSE DOES NOT BAR THE STATE OF OKLAHOMA FROM PRESCRIBING MAXIMUM INTEREST RATES WHICH MAY BE CHARGED OKLAHOMA RESIDENTS IN MAIL ORDER CREDIT SALES.

In its review and analysis of Aldens' Due Process challenge to the section of the Oklahoma Uniform Consumer Credit Code at issue here, the Court of Appeals adopted the teaching of *Travelers Health Ass'n.* v. *Virginia*, 339 U.S. 643 (1950), which, posits the Court of Appeals:

> " 'rejected the contention' that the doctrines of place of contracting and place of performance should govern, and held that they must give way to the 'degree of interest' the state had in the transaction of the subject, and give way to the consequences of the contracts in the regulating states." *Aldens* v. *Ryan* (*supra*), at 1161 (A25-26). *Also citing Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313 (1943).

The Tenth Circuit Court of Appeals thus accurately identified, as did the District Court below and the Courts of Appeal for the Third and Seventh Circuits in *Packel* (*supra*), and *LaFollette* (*supra*), the Due Process test to be an interest analysis approach which focuses upon the interest of the State sufficient to "justify *any* exercise of sovereignty in connection with the transaction in dispute." *Packel* (*supra*), at 42. Also see *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 223 (1957);

and, *International Shoe Co.* v. *State of Washington*, 326 U.S. 310 (1945).

The interest analysis approach thus proffered by this Court has been applied by other courts in sustaining the Due Process constitutionality of state regulations affecting other mail order operations. *See*, for example, *People* v. *Fairfax Family Fund, Inc.*, 47 Cal.Rptr. 812, 235 Cal.App.2d 881 (1965), *appeal dismissed* (for want of a substantial federal question) 382 U.S. 1 (1965), which upheld California's regulation of mail order loan transactions between a Kentucky based firm and residents of California; *Minister's Life & Casualty Union* v. *Haase*, 30 Wis.2d 339, 141 N.W.2d 287 (1966), *appeal dismissed* (for want of a substantial federal question) 385 U.S. 205 (1966), and *United National Life Insurance Co., et al.* v. *California*, 58 Cal.Rptr. 599, 427 P.2d 199 (1967), *appeal dismissed* (for want of a substantial federal question) 389 U.S. 330 (1967), which upheld Wisconsin and California regulations of mail order insurance transactions between foreign corporations and residents of those states; and *State of Washington* v. *Reader's Digest Ass'n., Inc.*, 81 Wash.2d 259, 501 P.2d 290 (1972), *appeal dismissed* (for want of a substantial federal question) 411 U.S. 945 (1973), which upheld the application of the State of Washington's Consumer Protection Act to the mail solicitations of Reader's Digest.

Petitioner relies heavily on *National Bellas Hess* v. *Department of Revenue*, 386 U.S. 753 (1967), to bolster its contention that the Due Process Clause invalidates Oklahoma's interest rate ceiling as it relates to out-of-state mail order merchandisers. There this Court held unconstitu-

tional an Illinois statute imposing a duty on an out-of-state mail order firm to collect the Illinois use tax. The tax aspect of that case, however, places it in a neutral category, not supportive of Aldens' theories, nor in conflict with the "interest analysis" approach above. At least since 1946, it has been recognized, as Mr. Justice Frankfurter spoke in *Freeman* v. *Hewitt*, 329 U.S. 249, 91 L.Ed. 265 (1946):

> "A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests . . . attempts at . . . taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce." 329 U.S. at 253.

All of the Courts, those in Pennsylvania, Wisconsin and Oklahoma, and the Courts of Appeal for the Third, Seventh and Tenth Circuits, when confronted with the issues raised by Petitioners here, have recognized the States' sovereign protective interests in protecting their respective citizens from the imposition of excessive rates of finance charges. The *LaFollette* (*supra*) Court was very succinct in recognizing the Wisconsin law at issue there to be:

> ". . . a measure to safeguard members of the public desiring to secure [goods] by [credit], who are peculiarly unable to protect themselves from fraud and overreaching of those engaged in a business notoriously subject to those abuses." *Aldens* v. *LaFollett* (*supra*), at 751, citing *California* v. *Thompson*, 313 U.S. 109, 112-113, 61 S.Ct. 930, 932, 85 L.Ed. 1219 (1940).

The Oklahoma Statute, expressive of the State's clear duty and substantial interest in so protecting its citizens

from excessive interest rates is not violative of Due Process, nor is such regulation inconsistent with the decisional authority of this Court, and therefore, need not be reviewed by this Court.

II.

THE COURT OF APPEALS PROPERLY HELD THAT THE IMPOSITION BY OKLAHOMA OF A MAXIMUM INTEREST RATE CEILING ON MAIL ORDER CREDIT SALES DOES NOT CONSTITUTE AN UNDUE, AND CONSTITUTIONALLY IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE.

Petitioner contends it is an interstate trader engaged in pure interstate commerce and is, therefore, *per se* exempted from State regulation. Properly rejecting the *per se* approach, in favor of a balancing of the interests involved,[2] the Tenth Circuit Court of Appeals added:

> "The States can, of course, pass Acts which affect commerce unless the burden so imposed greatly exceeds the extent of the local benefits." *Aldens* v. *Ryan* (*supra*), at 1162(A-26).

Also, see *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977); *Great Atlantic and Pacific Tea Company, Inc.* v. *Cottrell*, 424 U.S. 366,

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[2] The balancing approach was most recently recognized by this Court in the case of *Raymond Motor Transportation, Inc.* v. *Rice*, ... U.S. ....., ..., 46 U.S.L.W. 4109 (1978). Although the roles were reversed and it was the State seeking to avoid the balancing, this Court, nevertheless, said ". . . we cannot accept the . . . contention that the inquiry under the Commerce Clause is ended *without a weighing* of the [interest of the State] against the degree of interference with interstate commerce." 46 U.S.L.W. 4113 (Emphasis added).

96 S.Ct. 923, 47 L.Ed.2d 55 (1976); *Head* v. *New Mexico Board*, 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963).

Petitioner's contention is that any State regulation of the "purely interstate activities" of a foreign corporation is invalid. That position and its corollary (*i.e.* States are totally helpless to regulate any activity of a foreign corporation, regardless of any harmful effects of that activity) are entirely without merit. For, as Mr. Chief Justice Stone opined in *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945):

> ". . . in the absence of conflicting legislation by Congress, there is a residuum of power in the State to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." 325 U.S. at 767.

The most cogent analysis directly on point with the case at bar is that made by the Third Circuit Court of Appeals in *Aldens, Inc.* v. *Packel* (*supra*), the first of the three lawsuits challenging the identical application of laws substantially similar to those at issue here. The *Packel* guidelines were subsequently adopted by the Circuit Court of Appeals in *Aldens, Inc.* v. *LaFollette* (*supra*), the District Court below and the Court of Appeals in the instant case.

Recognizing the need for a workable analytical structure with which to deal with Commerce Clause issues of the type at bar, and to avoid the ". . . futile exercise of color-matching the stipulated facts in [a] case to the Commerce Clause cases which appear to glow with the most nearly similar hue," *Packel* (*supra*), at 45, the *Packel* Court

suggests that a State's choice of law is limited by the Commerce Clause to the extent:

1. The area of the law is one in which Congress has already made its own choice of law; or
2. The area of the law is one in which Congress has not made its own choice of law; but
   a. despite Congressional inaction, the area of law requires national uniformity; or
   b. The State's choice of law discriminates against interstate commerce; or
   c. the State law in question imposes a burden on interstate commerce in excess of any value attaching to the State's interest in imposing the regulation. (footnotes omitted) *Aldens, Inc.* v. *Packel* (*supra*), at 45, 46.

In the light of Congressional enactment of the Federal Consumer Credit Protection Act (15 U.S.C. § 1610 *et seq.*), there exists little question that Congress not only considered but expressly rejected the proposition that it replace the States' choices of law with its own, at least in the area of the setting of maximum interest rate ceilings.[3] The appropriateness of State police power regulation of interest rates was recognized by the Courts even long before Congress made its consideration and determination. *See, Grif-*

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[3] "This title *does not otherwise annul, alter, or affect* in any manner the meaning, scope or applicability of the *laws of any State*, including, but not limited to, laws *relating to the types, amounts or rates of charges* or any element or elements of charges permissible under such laws in connection with the extension or use of credit . . ." 15 U.S.C. §1610(b) (Emphasis added).

fith v. *State of Connecticut,* 218 U.S. 563, 54 L.Ed. 1151; *Equitable Credit and Discount Co.* v. *Greer,* 342 Pa. 445, 21 A.2d 53 (1941); and more recently, *Oxford Consumer Discount Co.* v. *Stefanelli,* 246 A.2d 460, *appeal dismissed* 400 U.S. 808, *rehearing denied* 400 U.S. 923 (1970); *Aldens, Inc.* v. *Packel* (*supra*), at 48. It is respectfully suggested that, although its power to do so is unquestioned, Congress has chosen not to enact a nationally-uniform rate ceiling, but has rather deferred such rate-making to its historic author—the State.

The District Court below spoke of the evenhandedness of the Oklahoma law in question, pointing out "It imposes *exactly* the same burdens on in-State sellers as upon out-of-State sellers." (Emphasis added) *Aldens, Inc.* v. *Ryan* (A-14). The accuracy of the contention that the application of the Oklahoma law in question is non-discriminatory in its effects on commerce is not at issue here.

When confronted with the admittedly difficult task of determining the Commerce Clause constitutionality of a local regulation by weighing the burden of that regulation on commerce against the interest of the State, this Court and other courts have variously referred to the burden as "impermissible," "serious," "undue," "excess," or "threatening." The use of these modifying adjectives clearly connotes what this and other courts have long recognized—the imposition by local regulation of a *mere* burden on interstate commerce is not sufficient, in and of itself, to render that regulation unconstitutional. Rather, a certain degree of burden will be tolerated, the extent of which is determined by the nature of the local interest involved,

and the local regulation will be upheld ". . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church,* 397 U.S. 137, 25 L.Ed.2d 174, 90 S.Ct. 844 (1970).

Respondent does not now, nor has he ever contended the imposition of Oklahoma's maximum interest rate ceiling on Petitioner's Oklahoma credit accounts does not constitute a burden. What is urged, however, is that the imposed burden is, first, one which was undoubtedly a matter of which notice was taken and a balance struck when Congress expressly deferred interest rate-making to the States.

Primarily, however, Respondent asserts that the burden arising from the imposition of Oklahoma's maximum interest rate ceiling on Aldens' credit accounts is clearly not excessive, is indeed slight when compared with the sovereign interest of this State in protecting her citizens from potential abuses by extenders of credit. The Tenth Circuit Court of Appeals, thus, accurately and properly upheld the constitutionality of the Oklahoma law at issue by using the *Packel* Court's analytical matrix, and by recognizing that Oklahoma's protective interest in her citizens overshadows the slight burden on interstate commerce imposed by the law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Petitioner herein has presented no issues worthy of discretionary review by this Court, and therefore, its petition should be denied.

Respectfully submitted,

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